Supreme Court, U.S.
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No. 91-1407

In The
Supreme Court of the United States

October Term, 1991

WHITE BUFFALO CONSTRUCTION, INC., an Oregon Corporation; TRANSAMERICA INSURANCE COMPANY, a California Corporation,

Petitioners,

v.

UNITED STATES OF AMERICA, for the Use and Benefit of J. ARLIE BRYANT, INC., a Washington Corporation,

Respondent.

BRIEF OF J. ARLIE BRYANT, INC. IN OPPOSITION TO CERTIORARI PETITION

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JURISDICTION

This is a Miller Act case over which the district court had jurisdiction pursuant to 40 U.S.C. §270b. The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291. This Court has jurisdiction to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit upon timely receipt of a petition for Writ of Certiorari.[1] 28 U.S.C. §1254(1); 28 U.S.C. §2101(c); Supreme Court Rule 13.4.

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[1] *The time limits for filing a Petition for Writ of Certiorari are mandatory and jurisdictional.* Missouri v. Jenkins, *495 U.S. 33, 109 L.Ed.2d 31, 110 S.Ct. 1651, 1660 (1990). Respondent proposes that Petitioners' certiorari petition should be deemed untimely due to a misuse of the extension process.* See *Argument, Section I, supra.*

STATEMENT OF THE CASE

Respondent, J. Arlie Bryant, Inc., a Washington corporation (hereinafter "Bryant") operates a rock crushing business in the states of Oregon and Washington. Petitioner, White Buffalo Construction, Inc. (hereinafter "White Buffalo"), is a minority general contractor authorized to do business within the states of Washington and Oregon.

After extensive negotiations, Bryant and White Buffalo signed and executed a written contract for work on a road improvement project within the state of Washington. The owner of the project was the Federal Bureau of Indian Affairs.

Following completion of its subcontract work, a dispute arose between the parties over the timeliness of Bryant's performance and post-completion insurance requirements. After White Buffalo continued

to refuse payment for Bryant's subcontract work, Bryant commenced an action in the United States District Court for the Eastern District of Washington against White Buffalo and its bonding company, Transamerica Insurance Company, under the Miller Act, 40 U.S.C. §270, et seq. White Buffalo filed an answer, affirmative defense and counterclaim alleging that Bryant breached the parties' subcontract and alleging damages as a result of such breach in an amount in excess of $30,000.

On July 16, 1990, the parties appeared before the United States District Court for the Eastern District of Washington for a bench trial. During opening argument, the parties presented two primary issues to the District Court:

> (1) Whether Bryant timely completed its rock crushing work under the written subcontract

agreement; and

(2) Whether Bryant complied with the insurance provisions of the subcontract.

The district court noted, and the parties candidly admitted, that these two contractual interpretation issues were threshold legal issues which the court could determine as a matter of law.

Prior to ruling on the legal issues, the district court heard and considered a substantial amount of extrinsic evidence, including the provisions of the subcontract agreement, oral testimony and the parties' exhibits. The trial court expressly noted that it had heard all evidence that would be offered by either party regarding the explanation, modification, or interpretation of the provisions of the subcontract relating to the insurance and completion

date issues.[2] (App.1, p.1). The court also noted that it heard oral evidence in order to focus on the "circumstances under which the contract documents were formulated." (App.1, p.1). Following these introductory notes, the court then determined the threshold legal issues as a matter of law.

After considering the evidence, the district court concluded that the subcontract unambiguously gave Bryant the right to cancel the required liability insurance when its work on the project was completed, and that Bryant's completion of all work on the project was "within approximately two and one-half months" as permitted by the

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[2] *For judicial convenience, Bryant has attached as Respondent's Appendix 1 a true and correct copy of a transcript of the district court's oral decision. The court's oral decision was expressly incorporated into its written Findings of Fact and Conclusions of Law entered on July 30, 1990.*

contract. Alternatively, the court held that if the completion date and insurance provisions were ambiguous, they should be construed against White Buffalo, as drafter. Based on its rulings, the court entered a money judgment against White Buffalo, in favor of Bryant, in the amount of $63,516.11, including attorney fees.

The Court of Appeals for the Ninth Circuit affirmed the district court in an unpublished, memorandum decision which stated that the district court had considered all relevant evidence on the contract interpretation issues and that the district court's interpretation was not clearly erroneous.

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ARGUMENT

I. WHITE BUFFALO MISUSED THE EXTENSION PROCESS AND ITS PETITION SHOULD BE CONSIDERED UNTIMELY

Pursuant to 28 U.S.C. §2101(c), a Writ of Certiorari must be filed within 90 days of the entry of the judgment below, which time period may be extended by a Justice of the Supreme Court for "good cause", for a period not to exceed 60 days. See also Supreme Court Rule 13. Applications for an extension of time should be submitted 10 days before the specified final filing date and are "not favored". Supreme Court Rule 30.2; Supreme Court Rule 13.6. This Court recently has reiterated that: "This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits." Missouri v. Jenkins, 495 U.S. 33, 109 L.Ed.2d 31, 110 S.Ct. 1651, 1660 (1990).

In the present case, White Buffalo's 90-day time limit commenced on September 27, 1991, the date the Ninth Circuit denied White Buffalo's petition for a rehearing. In a letter dated December 12, 1991, White Buffalo made a *pro se* request for an extension of time to file a Petition for a Writ of Certiorari. A copy of White Buffalo's extension request is set forth in Respondent's Appendix No. 2. White Buffalo's alleged reasons for the extension were that its counsel (Stoel, Rives, Boley, Jones & Grey of Portland, Oregon) had withdrawn from representation, and White Buffalo needed additional time to prepare its pro se petition. In a January 7, 1992 order signed by Justice Sandra Day O'Connor, White Buffalo was granted an extension of time to file a Petition for Writ of Certiorari to and including February 1, 1992. After the extension was

granted, White Buffalo's *same* legal counsel, Charles F. Adams of Stoel, Rives, Boley, Jones & Grey proceeded to prepare, sign and file White Buffalo's Petition for Writ of Certiorari currently before this Court, acknowledging that White Buffalo had obtained the extension pro se but stating that "it was later determined that legal counsel would be required for the corporation." See, White Buffalo's Petition for Certiorari, page 12, fn. 3.

Questions of subjective good faith aside, White Buffalo and its counsel have misused the extension process. As this Court recently has recognized, something beyond a simple withdrawal of counsel or need for additional research time must be demonstrated by an applicant before an extension for "good cause" will be granted. See, e.g., Madden v. Texas, ____ U.S. _____, 112 L.Ed.2d 1026, 111 S.Ct. 902, 905

(1991); Kleem v. Immigration and Naturalization Service, 479 U.S. 1308, 93 L.Ed.2d 566, 107 S.Ct. 484 (1986). Based on the above-cited decisions, and absent White Buffalo's pro se application, it is extremely doubtful that "good cause" for an extension of time to file a certiorari petition could have been demon-strated. In the present case, the fortuitous withdrawal and re-entry of counsel allowed White Buffalo to obtain an extension to file a certiorari petition which otherwise would not have been granted. Such action constitutes a misuse of the extension process. Bryant submits that, for this reason, White Buffalo's Petition for Writ of Certiorari should be deemed untimely and this Court should not invoke its jurisdiction to hear this matter.

II. THERE ARE NO "SPECIAL OR IMPORTANT" REASONS JUSTIFYING REVIEW BY THE SUPREME COURT

This Court has consistently recognized the importance of denying Writs of Certiorari except in cases involving legal principles, the settlement of which have importance to the public as distinguished from that of the parties, or in cases where there is a "real and embarrassing" conflict of opinion and authority between the Circuit Courts of Appeals. See, e.g., Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614, 620 (1955) (citing, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 43 S.Ct. 422, 423, (1923)); See also Supreme Court Rule 10.1(a). Boiled down to its essence, the parties' dispute simply involves the application of state law contract

principles to interpret a private written contract.[3] There are no questions of

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[3] *Bryant agrees with White Buffalo that the parties' dispute must be resolved by application of state law contract principles, however, for different reasons. Contrary to White Buffalo's assertion in its certiorari petition, federal court jurisdiction was not based on diversity of citizenship, but was based upon application of the Miller Act, 40 U.S.C. §270b, which statute is attached as Respondent's Appendix 3. When Jurisdiction is conferred by the Miller Act and not by diversity of citizenship, state law controls the interpretation of Miller Act subcontracts to which the United States is not a party, while questions regarding substantive rights and remedies under the Miller Act remain governed by federal law. Cf., U.S. For Use Of Palmer Constr. v. Cal State Elec., 940 F.2d 1260, 1261 (9th Cir. 1991); F.D. Rich Co., Inc. v. United States Industrial Lbr. Co., 417 U.S. 116, 417 U.S. 116, 40 L.Ed.2d 703, 94 S.Ct. 2157, 2164, (1974). In addition, Bryant disagrees with White Buffalo that the law of the state of Oregon is the appropriate state law to apply. In the Ninth Circuit, White Buffalo cannot argue legal error based on Oregon contract law because of its failure to apprise the Washington District Court of Oregon law. See, Federal Sav. and Loan Ins. Corp. v. Butler, 904 F.2d 505, 509 (9th Cir. 1990).*

federal law raised by White Buffalo's certiorari petition or the merits of the parties' underlying contractual dispute. Recognizing this, the court of appeals, without oral argument, in an unpublished memorandum decision, found that the district court's resolution of the contractual interpretation issues was proper. The court of appeals' ruling has no ramifications beyond the parties' to this case, and it may not be cited to or by courts of the Ninth Circuit except in extremely limited circumstances. See, Ninth Circuit Rule 36-3. The pending certiorari petition seems to be a simple attempt by White Buffalo to avoid paying a modest money judgment based on ordinary state law contract principles. There simply are no "special and important reasons" for this Court to invoke its discretionary juris-diction under Supreme Court Rule 10.1(a).

A. The Ninth Circuit Court of Appeals' Ruling is Not Inconsistent With Decisions in Other Circuits or Applicable State Law.

The primary issue that White Buffalo proposes for review is whether state law governs the interpretation and construction of contract terms in a diversity case. White Buffalo's stated issue is overly broad and misleading. Federal court jurisdiction at the district court level was based on the Miller Act, 40 U.S.C. §270b, and not diversity of citizenship. See note 3, supra.

Bryant would stipulate that as a general, legal proposition, when a federal court interprets written contracts in a diversity or Miller Act case, the state substantive law of contracts applies. See, e.g., In Re Aslan, 909 F.2d 367, 369 (9th Cir. 1990); U.S. For Use of Palmer Constr. v. Cal State Elec., 940 F.2d 1260, 1261

(9th Cir. 1991). Therefore, on its face, White Buffalo's petition fails to present an issue of public interest worthy of review.

In the body of White Buffalo's petition, it goes on to claim that the court of appeals erred by failing to apply an Oregon state law standard of review (de novo) to the contract interpretation dispute between the parties. See White Buffalo's Petition for Certiorari, p. 7.

Contrary to White Buffalo's assertions, the Ninth Circuit's review of the contract interpretation issues in the present case is not inconsistent with the general rule that the trial court's determination of questions of law are reviewed de novo while factual findings are reviewed on a "clearly erroneous" standard. The Ninth Circuit consistently has recognized that the question of what standard of review

applies to contract matters is not always clear because the interpretation of a contract can involved mixed questions of fact and law. L.K. Comstock & Co. v. United Eng. & Constructors, 880 F.2d 219, 221 (9th Cir. 1989); In Re U.S. Fin. Securities Litigation, 729 F.2d 628, 632 (9th Cir. 1983). In its memorandum decision, the Ninth Circuit simply found that the district court reviewed a considerable amount of extrinsic evidence, including the written contract, oral testimony and the parties' exhibits, and stated:

> "Because the district court relied on extrinsic evidence in interpreting the subcontract agreement, 'its interpretation of the contract will not be reversed unless it is clearly erroneous.'" Petitioner's Appendix B at p. 4 (citing, In Re U.S. Fin. Securities Litigation, 729 F.2d 628, 632 (9th Cir. 1983)).

The bottom line is that the Ninth Circuit's review of the parties' state law contract dispute is not inconsistent with any of the federal cases cited at page 8 of White Buffalo's pending petition. Its decision is not inconsistent with Washington or for that matter Oregon state law. See, Super Valu Stores, Inc. v. C.E. Loveless, 5 Wn. App. 551, 553, 449 P.2d 368 (1971) (trial court entitled to deference when making ambiguity determination based on extrinsic evidence); Adams v. Knoth, 102 Or. App. 238, 794 P.2d 796, 799 (1990) (if language of contract is ambiguous, extrinsic evidence may be admitted as to the parties' intent, which then becomes a question of fact).

Finally, even if the standard of review used by the Ninth Circuit did conflict with other circuits, this still is not a reason for granting White Buffalo's

Writ of Certiorari. A long time ago, this Court stated that:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a Writ of Certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860, 861 (1938).

Simply stated, the Ninth Circuit's application of state law standards of review and contract interpretation principles to the dispute at hand is not a "real and embarrassing" conflict of opinion, justifying Supreme Court review. Rice, 75 S.Ct. at 620.

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B. The Court of Appeals' Decision Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

White Buffalo also contends that the Ninth Circuit overlooked findings that were "unquestionably and irrefutably erroneous." White Buffalo's Petition for Certiorari, p. 7. Specifically, White Buffalo claims that it was not the drafter of insurance provisions in the parties' written contract. Even if true, Supreme Court Rule 10 implies and case law confirms that overlooked facts are an insufficient reason to justify review. United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496, 497 (1925). An erroneous factual determination made by the lower courts in this simple contract dispute does not involve any principles, the settlement of which have importance to the public.

CONCLUSION

For the foregoing reasons, White Buffalo's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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THE COURT: The court has by invitation heard the evidence which would be offered by either side, the explanation, modification or interpretation of the provisions of the contract as they relate to the issues in this case. It did so with a feeling that those might furnish direction for the resolution of issues and that in so doing narrow the issues and save to the party's litigant a substantial expenditure of time and money in the trial of this case. The Court against proceeded with the assumption that usually those issues are threshold and properly so, and prove again to be so in this case. The focus of our attention then is to our circumstances under which the contract documents were formulated.

The Court must say at the outset that the contract form which apparently the Defendant's principal procured from the attorney and is candid about getting it for a form which he intended to tailor to meet the needs of each occasion as they might arise, and it contains, the form itself contains what lawyers refer to as a merger

provision, an integration clause at Section 18.13 which indicates it's a final and entire agreement of parties, supersedes all prior contemporaneous, oral or written communications between the parties, that there are no promises, terms, conditions or obligations other than those contained herein. And it going on to say that the contract shall not be modified in any way except in writing signed by the party to which the modification is inserted.

Now, we are told that the special conditions, Attachment A, were arrived at by and between the parties after the Plaintiff's principal declined to sign the subcontract in the form presented in the August meeting. There is no question but that those were drafted by the Defendant and that he was the author of the language which was inserted as those special conditions, and likewise was the draftsman of the language contained under roman number No. 9 of page 9 of the document which has been read into the record which on its face gave the subcontractor, in this case the Plaintiff, the right to cancel the policies it required under the contract upon completion of the work.

Now, the Court in the interpretation of these agreements is constrained to rules which are familiar again to lawyers, they are basic in contract law, a six credit course taught in the first year of law school, they abound across the land, and the wisdom has been proven over the commercial centuries.

And the first is that where a merger provision is contained, as this one is, that parole testimony is not admissible to vary what is otherwise the clear provisions of the contract.

Dealing further, another tenant of contract law provides that the specific governs the general and the latest is to be given priority in its temporal presentation. The Court might also add that it has on occasion appended to those people who say that a lawyer who represents himself has a fool for a client. The Court is fond of pointing out that he's still a lot better off as a layperson who engages in doing his own legal work with the notion that he's going to accomplish economy, and usually it works decidedly to the contrary and certainly will in this case.

Here is a provision for which the

Court has been asked to accept as a requirement that the crushing will be completed sometime in October. The Court doesn't want or need to get into those factual disagreements because here's the language, and the Court quotes, subcontractor acknowledges that contractor is unable to perform his work without an ample stockpile of the specified aggregate. Subcontractor shall immediately commence work upon receiving notice to proceed and show work continuously and diligently until work is completed. Subcontractor shall commence and complete his work within approximately two and one half months.

Now, first of all it is contended that from the language that an ample stockpile is recognized as a necessity for the contractor to perform, that there is somehow an obligation placed upon this Plaintiff with regard thereto. If it is, it isn't defined. There's nothing in the contract that says what is to occur if it isn't maintained. There is not the usual provision for liquidated damages that a lawyer would have provided against that contingency except for the recognition that he is unable to perform it without an ample

stockpile.

And it goes on to say and then, the concluding paragraph after that statement is that the subcontractor shall commence and complete his work within approximately two and a half months. Now, in this case we're talking about a variation of 10 or 12 days in a two and a half month period. This Court would hold, if required to do so, that a 10 or 12 day lag in a two and a half month period is within the meaning of the word approximate. In all of the contingencies that can occur in a crushing contract in the mountains with the winter approaching is the scenario against which it's based that doesn't seem to the Court an unreasonable construction at all. But if that cannot be said, if the contract is ambiguous in that respect, it's got to be construed against the person who drafted it, and in that case that is the Defendant's principal. He chose the language, he's the one who undertook a definition in the manner indicated, and if approximately doesn't include a 10 or 12 day delay, the Court certainly feels that it would, if it doesn't, he has failed to provide us with any better identification,

and the Court feels that on that basis the language should be construed against the draftsman in favor of the person against whom it's sought to be imposed.

And the Court is, of course, made comfortable in this respect because there is no showing of any real damage of any kind to this Defendant in that regard. There is some hint that if he would have finished sooner, that is if the Plaintiff had finished sooner, that the whole matter might have been finished sooner, but if the Court had to reach that point on an evidentiary basis, it would be hard-pressed to accept the level of proof that is offered in evidence of this. Is Court is not resolving it on that basis, but as a matter of law.

Now, turning to the contract provision, paragraph 9, roman numeral 9, on page 9 in the critical section that's contained in b-2 in the second paragraph of that subparagraph. There is in b-1 a requirement for the furnishing of general liability including contractors liability, contingent liability, and so on, and all on a occurrence basis extended for at least two years after the completion of principal

contract with the limits at least on a combined basis of $3,000,000. The parties interpret that, at least the Defendants certainly interpret it to require maintaining insurance in force for a period of two years after completion of the principal contract. The Court questions that interpretation, that's just a matter of academic interest, and wonders if it's simply a requirement that the contractor for the insurance or the insurance contract as provided in accordance with the requirements of that section, that it covers occurrences, that is events rising within two years after completion of the contract. But that's really not important to the Court's resolution of it and accepting the parties argument about what it means.

The special condition placed in the second paragraph of 2, under B, clearly gives to the subcontractor the right to cancel the policy on its own volition upon completion of the work.

Now, there isn't any argument in this case that the work for all intents and purposes was completed by the 28th of November. The Court attaches nothing of

significance to the removal of the trees, but even if it did, performance of this subcontractor was accepted by the owner at the end of November, and thereafter he canceled the insurance above $1,000,000 that he carried. Now, maybe that wasn't what was meant to be said here, maybe the Defendant didn't really mean to give him that option, really he could have believed that the problem related to the difficulty in obtaining insurance or the problems with changing companies, that isn't what it says. It says that upon completion of the work without anybody's consent he can cancel the policy.

Now, that again is argued would conflict with b-1, maybe it does. If it does, against it's ambiguous, and again the ambiguity would be construed against the draftsman and in favor of the person against whom that provision is sought to be enforced. Again, it is a specific provision which prevails over the general provision that is in the printed form of the contract, and other contract law again is entitled to precedents in its meaning.

And so on those grounds and for those reasons the Court holds as a matter

of law that the damages claimed with regard to the delay which resulted by the fact that the contract took until the 28th of November to finish are not recoverable and likewise the cost, if the Defendant incurred any, of the acquiring additional insurance for the Plaintiff is not recoverable.

December 12, 1991

The Honorable Sandra Day O'Connor
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street N.E.
Washington D.C. 20543

Dear Justice O'Connor:

Our petition for rehearing case number 90-35730 was denied by the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on September 27, 1991. We would like to have the judgment issued by the Ninth Circuit that affirmed the decision of the United States District Court for the Eastern District of Washington, No. CV-87-0467-AAM reviewed.

I am requesting an extension of time to file our petition for writ of certiorari. I am requesting this extension because I will be proceeding with this case on a pro se basis due to the fact the my former counsel has withdrawn. I am not schooled in the art of the law. I require additional time to become familiar with the

procedures and the requirements to file my petition for writ of certiorari.

I have enclosed copies of the order denying rehearing and the decision of the Ninth Circuit. I have sent a copy of this letter to both opposing counsel.

Respectfully,

Luther L. Clevenger

pc: Ronald M. Somers
Thomas D. Cochran

RESPONDENT'S APPENDIX NO. 3

§270b. Same; rights of persons furnishing labor or materials. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act [40 USCS §§270a et seq.] and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship expressed or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the

date on which such persons did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the Untied States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was

supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(Aug. 24, 1935, c. 642, § 2, 49 Stat. 794; Aug. 4, 1959, P.L. 86-135, § 1, 73 Stat. 270).